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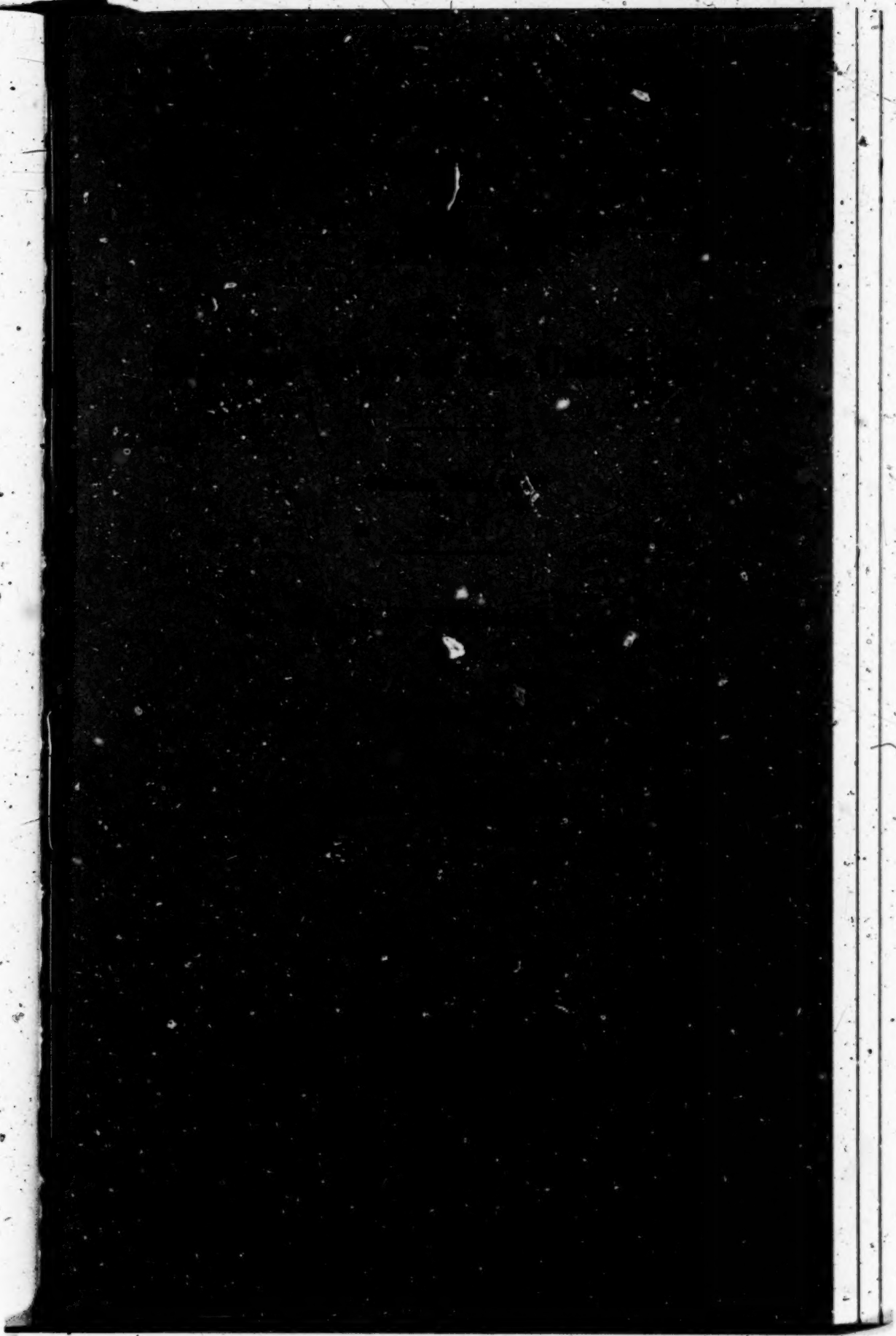

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No. 9 Original

In the

Supreme Court of the United States

October Term, 1937

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING,
Defendant,

and

THE STATE OF COLORADO,
Impleaded Defendant.

Objections to Intervention of the United States

I.

The State of Wyoming, original defendant in the above cause, respectfully objects to the intervention of the United States and to the granting of its motion for leave to intervene in this cause for the following reasons:

(a) Neither Wyoming nor Nebraska has refused or neglected to defend the appropriations made by the Secretary of the Interior or the rights of the water users under the Government projects.

(b) The motion fails to disclose that the United States has any substantial interest in the subject matter of this controversy other than such interest as any appropriator of water from the North Platte River, or its tributaries, may have.

(c) The Congress of the United States has not empowered the United States to assert any authority over or attempt to regulate or control the diversion or use of the waters of the North Platte River, a non-navigable stream within the boundaries of either of the litigant states, except in compliance with the laws of those states.

(d) The United States has unreasonably delayed the filing of its motion.

II.

Wyoming objects to the filing of the petition of intervention on behalf of the United States in this cause for the following reasons:

(a) The petition of intervention is insufficient in substance to warrant the granting of the relief prayed for by the United States, or any relief, either at law or in equity.

(b) That the United States does not own the waters appropriated by the Secretary of the Interior and that it does not own the unappropriated waters of the non-navigable streams in the arid-land states has already been decided by this Court.

ARGUMENT.

As to the first of Wyoming's objections to the granting of the motion of the United States for leave to intervene and in answer to the claim of the United States that Wyoming and Nebraska have refused to defend the Government's appropriations, it is necessary only to examine the transcript of the evidence referred to in the motion, a copy of which transcript containing the evidence appearing at pages 1260 to 1265, and pages 1291 to 1296, of the record is hereto attached, marked Exhibit "A". This record clearly discloses that there has been neither neglect nor refusal on the part of either of the states to protect the Secretary's appropriations. It may be said that the occasion for the introduction of evidence on the part of Wyoming has not yet arisen for the reason that Nebraska, the plaintiff, has not yet closed its case.

As to the delay on the part of the Government in presenting its motion for leave to intervene, it need only be said that the motion of Wyoming seeking to bring the Reclamation Service into the case was denied by the Supreme Court just three years ago, that the taking of testimony began about two years ago, and has proceeded ever since, that several months have been devoted to the taking of testimony, that more than eight thousand pages of testimony has already been transcribed, that the evidence has covered almost the entire field of inquiry in Nebraska, that the cost of litigation to each of the states involved has already amounted to many thousands of dollars, that the United States has known of the pendency of the litigation from the beginning and that one of the attorneys of the Reclamation Service has been in attendance at the hearings mentioned much of the time. It would seem to be evident that if the United States believed that it had an interest in the litigation, which could be protected only by its becoming a party, it should have moved to intervene at the outset of the litigation, and that its delay in presenting its motion is sufficient reason in itself for denial of the motion. The United States should not now be permitted to intervene.

The other grounds of objection will be considered in the course of the argument.

The following propositions have been established by the decisions of this Court:

1. By the Act of March 3, 1877 (19 Stat. 377), if not before, all unappropriated waters of non-navigable streams in the arid portions of the public domain became property of the public subject to the plenary control of the states.

2. There is no Federal statute authorizing the United States, or any of its agencies, to make an appropriation of water except the Reclamation Act of 1902, and under that Act an appropriation of water may be made by the Secretary of the Interior only in conformity with the laws of the state or territory wherein the appropriation is made. The Secretary of the Interior, as an appropriator of water, is in the same position as any other appropriator.

3. The United States is not the owner of unappropriated water or of water rights under appropriations made by the Secretary of the Interior, but such rights belong to the owners of the land upon which the water is applied.

4. The Congress in accepting, ratifying and confirming the Constitution of Wyoming agreed that the natural waters within its boundaries are the property of the State.

The following cases support the principles stated:

Wyoming v. Colorado, 259 U. S. 419.
Tartar v. Spring Creek Water and Mining Co., 5 Calif. 396.
Atchison v. Peterson, 20 Wall 507, 87 U. S. 414.
Broder v. Natoma Water and Mining Co., 101 U. S. 274.
Fallbrook Irrigation District v. Bradley, 164 U. S. 112.
Clark v. Nash, 198 U. S. 361.
Kansas v. Colorado, 206 U. S. 46.
Wyoming v. Colorado, 286 U. S. 494.
Arizona v. California, 283 U. S. 423.
California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142.
Ickes v. Fox, et al, 300 U. S. 82.
Brush v. Commissioner, 300 U. S. 352.
Nebraska v. Wyoming, 295 U. S. 40.
Nebraska v. Wyoming, 296 U. S. 548.
Farm Investment Co. v. Carpenter, 9 Wyo. 110, 61 Pac. 258.

The modern practice of appropriation of water, a use essentially different from that followed in the eastern part of the United States, began with the beginning of mining in California. Water was found to be necessary in carrying out the operations of the miners. The streams were few and small. Water running in the natural channel was, in most instances, of no value and to make use of it, it was necessary to conduct it through ditches to places in many instances remote from the stream itself. Frequently it was not returned to the natural channel, but was consumed in its use. Such use arose out of the necessity of the situation and

involved, in the very nature of the case, the assertion of ownership of the water to the extent at least that it was consumed in the use.

At first, and for a long time, there was no statutory law, either Federal, Territorial or State, governing the use of such water and the miners were under the necessity of making a law for themselves. The principle upon which the rules adopted in the mining districts was based first in time, first in right, with the limitation that water could be appropriated only to the extent it could be beneficially used.

The Territorial Legislatures, the State Constitutions, the State Statutes and the State appellate courts recognized the principle stated and that waters of a non-navigable stream in the arid regions of the country became *publici juris* long before the Act of July 26, 1866 (14 Stat. 253). Tartar v. Spring Creek Water and Mining Co., 5 Cal. 396, Farm Investment Co., v. Carpenter, 9 Wyo. 110. The same principle was recognized by the Supreme Court of the United States, Atchison v. Peterson, 20 Wall 507, 87 U. S. 414, Broder v. Natoma Water and Mining Co., 101 U. S. 274.

In the Broder case the law governing the rights of appropriators based upon the principle of priority of appropriation to the extent of beneficial use was said already to be the "established doctrine" and that the Act of 1866 was "rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." The same view has been taken by the appellate courts in practically all the arid states.

If there was any doubt as to whether, prior to the Act of 1877, the United States had divested itself of title to the water of non-navigable streams in the arid region and such water had become the property of the public, that doubt was dispelled by the decision of this Court in Brush v. Commissioner, 300 U. S. 352, in which case the Court said that the United States, being the owner of the public domain, had the right to dispose of the water and the land together or separately, and that having disposed of the water, a patent from the Government gave the patentee nothing but the naked land. Referring to the Desert Land Act of 1877, this Court said:

"Following this Act, if not before, all non-navigable waters then on and belonging to that part of the national domain became *publici juris*, subject to the plenary control of the arid-land states and territories with the right to determine to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. California Oregon Power Co. v. Beaver Cement Co., 295 U. S. 142, 155, et seq."

If possible, even more explicit to this point is the opinion of Mr. Justice Sutherland in Ickes v. Fox, et al, 300 U. S. 82, in which, replying to petitioner's contention that the United States was the owner of the water appropriated and therefore a necessary party to an injunction suit brought by the plaintiff against the Secretary of the Interior, the Court held that the claim that by an appropriation made by the Secretary of the Interior the water or the water rights appropriated became the property of the United States was not well founded; that the appropriation was for the use of the land owner; that under the Act of 1877, all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states and that the right to the use of such waters could only be acquired by prior appropriation for beneficial use under state laws. The conclusion was therefore reached that the United States was not a necessary party.

In Brush v. Commissioner of Internal Revenue, 300 U. S. 352, the Court said that by the Act of 1877, the waters upon the public domain in the arid states were "dedicated" to the use of the public.

The language of the Act of 1877, in which it is provided that surplus waters "shall remain and be held free for the appropriation and use of the public," considered in the light of the opinion of Mr. Justice Sutherland in the California Oregon Power case, in which he said that by the Act of 1877, if not before, such water became *publici juris*, and in the light of his opinion in the Fox case, in which he said such waters were "dedicated" to the public use, would seem definitely to dispose of the contention of the Attorney General that the grant of public waters was revocable.

When the United States, by an Act of Congress, says that water owned by it shall remain and be free for public use and the Supreme Court says that such waters thereby became *publici juris* and that they were dedicated to public use, there seems to be no room to contend that such dedication was not final and irrevocable.

The Constitution of the State of Wyoming adopted in 1889, Section 1 of Article 8, provides that

> "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state,"

and the Act of Congress of July 10, 1890, by which Wyoming was admitted into the Union, provided that the Constitution as adopted by the people of the territory of Wyoming was "accepted, ratified and confirmed" (26 Stat. 222). Whether the State Constitution, coupled with the Act of Admission in the language quoted, constituted a compact between the Federal and State governments as contended by Chief Justice Potter in Farm Investment Co. v. Carpenter, 9 Wyo. 110, 135-137, the action of Congress in admitting the state with a provision in its Constitution asserting ownership of the natural waters within its boundaries is worthy of serious consideration as indicating the understanding of both the people of the state and the Congress as to the ownership of such waters.

It would seem to be clear that in view of the Act of 1866, as amended by the Act of 1870, and the Act of 1877, and the several decisions of the Supreme Court of the United States, the United States has no ownership either in the water appropriated by it in Wyoming or in the unappropriated waters of the North Platte River or any other non-navigable stream in the arid states, and that, therefore, it is not entitled to intervene in this cause.

The question, as we view it, was definitely settled in the instant case, 295 U. S. 40, in which, in an opinion by Mr. Justice Roberts Wyoming's motion to bring the Secretary of the Interior into the case was over-ruled upon the ground that the Secretary under his appropriation of water from

the North Platte River in Wyoming, stands in the position of any other appropriator and is represented in this suit by the State of Wyoming.

We believe that the motion of the United States for leave to intervene should be denied for the reason, if for no other, that no showing is made either in the motion or in the attached petition of intervention that there are any unappropriated waters in the North Platte River, and for the further reason that, as indicated at page 69 of the Attorney General's argument, the assertion of ownership of the water in the United States is made only for the purpose of the intervention and without any intention on his part to press the question for determination.

Moreover, it seems to be clear that there is no Act of Congress under which the United States, or any of its departments or agencies, has any power or authority to exercise control over any appropriation of water, and that the only legislative authority by which an appropriation can be made by any of the agencies of the Government is the Reclamation Act of 1902, under the provisions of which appropriations may be made by the Secretary of the Interior but only in conformity to the laws of the state in which the appropriation is made.

We respectfully submit that the motion of the United States for leave to intervene is without merit and should be denied.

Respectfully submitted,

RAY E. LEE,
Attorney General of Wyoming,

ROBERT R. ROSE,
JAMES A. GREENWOOD,
SOLICITORS FOR DEFENDANT.

THOS. F. SHEA,
Deputy Attorney General,

WILLIAM C. SNOW,
Assistant Attorney General,
OF COUNSEL.

EXHIBIT "A"

Lincoln, Nebraska
Supreme Court Room No. 2,
State Capitol Building,
Saturday, November 14, 1936,
10:00 o'clock a. m.

JUDGE ROSE: Is your Honor ready to proceed?

THE MASTER: Yes.

JUDGE ROSE: If the Court please, there is a matter that came up yesterday that I think calls for a clarification of the position of the State of Nebraska.

At the outset of this hearing, Your Honor asked the counsel of the three States to make a statement of the principle of law deemed to be applicable under the general outline of the case. At that time Wyoming made its statement and counsel for Nebraska made their statement, but in the statement made by counsel for Nebraska I do not recall that there was any mention made of these claimed out-of-priority diversions in Wyoming of water to be used in the State of Nebraska. If there was any mention made, it was not emphasized. Now, this feature of the case has been brought prominently into the case by the testimony, yesterday, of Mr. Meeker and I think the position of the State of Nebraska with reference to it ought to be clarified.

Mr. Meeker testified with reference to these Interstate canals, the Interstate canal, the Fort Laramie canal, the Mitchell canal and the French ditch. He said that all of these divert water in Wyoming. He said that as to the Interstate canal the water was primarily used in Nebraska. As to the Fort Laramie canal he testified that there was about 50 percent of it used in Nebraska and 50 percent in Wyoming. As to the Mitchell canal he said it is all used in Nebraska, and as to the French canal the larger part of it. He also testified that this water is used in the Western part of Nebraska, most of it in Scotts Bluff and Morrill counties, and that if it were not used under what they claim to be out-of-priority diversions, it would be available for the use of senior appropriators east of these two counties.

Now, it seems to us that under the circumstances this case has sort of resolved itself, to a major extent, into a controversy between certain appropriators in Nebraska and certain other appropriators in Nebraska. It seems to us to be obvious that Wyoming cannot be charged with alleged out-of-priority diversions made in Wyoming of water used in the State of Nebraska and we think that we are entitled to know what the position of Nebraska is and we think they should state into the record what their position is with reference to these out-of-priority diversions and out-of-priority storage which, according to the testimony, amounts to 60,919 acre feet.

MR. GOOD: That is not a correct reflection of the testimony so far on that.

JUDGE ROSE: That is our understanding of the testimony —that is for the year 1934.

MR. GOOD: For the year 1934 that is shown as 49,000 feet, but go ahead.

JUDGE ROSE: It is a very substantial amount. I think our figures are correct. We have examined this record.

Now, specifically, we think Nebraska should state what its contention is, whether it intends to charge to Wyoming, as out-of-priority diversions, the water that is diverted in Wyoming but is used in Nebraska for the benefit of Nebraska—diverted for the benefit of Nebraska; and specifically whether it now contends and intends to contend that, under Nebraska law and particularly in view of the last decision of the Nebraska court in the Mitchell case, the water officials in Nebraska have the right either to prevent further the diversion of these waters in Wyoming—prevent Wyoming from the diversion of these waters in Wyoming to be used in Nebraska, or whether if waters are diverted, Nebraska contends that the Nebraska irrigation officials have the right when the water reaches Nebraska to return it to the stream and control it in Nebraska and to make uses of the water for the benefit, we will say, of senior appropriators down stream from these western counties, different from the uses for which it was originally diverted. We think that Nebraska, at this time, should make its position clear on these points.

MR. GOOD: In that connection I would like to state that the testimony which we are producing is exactly responsive to our bill of complaint and the bill of complaint speaks for itself.

I would like to state further that this request on the part of Wyoming comes somewhat late in the proceedings in view of the fact that precisely this same type of testimony with reference to what happened in the year 1935 was produced in the July hearing, some four or five months ago. This precise line of testimony was in connection with these same canals.

As to any further statement in connection with this we would like to reserve our statement until we have studied Judge Rose's request.

JUDGE ROSE: We propose, if the Court please, to renew this request not later than Monday morning because it is vitally important to Wyoming.

In other words here is the question: Is Wyoming going to be called upon to defend its own rights only,—that is the claims that Wyoming appropriators make to waters of this stream appropriated and used in Wyoming, or is it going to be called upon to defend such of Nebraska irrigators using the waters of these interstate diversions, diverting in these interstate canals in Wyoming and used in Nebraska against a suit filed against them and the State of Wyoming—and actually against them by the State of Nebraska.

MR. GOOD: I can't say for sure how much time I may need for an answer, on the spur of the moment, in view of the fact that this same type of evidence was before the State of Wyoming last July.

JUDGE ROSE: That is all the more reason why the position should be stated.

MR. GOOD: Well, if Wyoming wanted to know, I don't know why they shouldn't have asked at that time rather than waiting at this point in the second session.

However, we would like to study this request of Wyoming's and make a somewhat careful analysis of what they request.

JUDGE ROSE: The real significance of that testimony was brought out yesterday in the conclusions reached by the witness, Mr. Meeker, now on the stand. And I want to repeat that we shall renew this request Monday morning on the part of the counsel of the State of Nebraska and renew it throughout the hearing until it is answered.

THE MASTER: There is no objection in any event to anybody taking some time, if they choose, to study the scope of the request and formulate their position.

I might say that the same question did arise in my mind as I was listening to this testimony and I was left undecided as to just how far the State of Nebraska intended to go in basing claims upon diversions in Wyoming which, I suppose, are controlled by Wyoming but the benefit accrues to Nebraska users; so I do think that at some proper time, within a reasonable time, Mr. Good, it might clarify things if, maybe, you would clarify your statement.

MR. GOOD: I have very clearly in mind what our purpose is but I think it would be a matter of accuracy if I had an opportunity to set that down in writing first.

THE MASTER: Well, it will be reasonable to do that, I am sure.

MR. GOOD: Are you ready for us to proceed with the evidence now?

JUDGE ROSE: Oh, yes.

SECOND WEEK

Lincoln, Nebraska,
Monday, November 16, 1936.
10 a. m.

(Hearing reconvened pursuant to adjournment from Saturday, November 14, 1936, at 11:30 a. m., to Monday, November 16, 1936 at 10 a. m.)

MR. GOOD: I have, in opening this session, a statement to make and I will give a copy to the reporters here so they don't need to take it down, but I will read it because I think it is important.

In connection with Wyoming's request made at the opening of the session of November 14th, Nebraska has the following statement to make:

We believe that the fundamental basis for the solution of all the problems raised in this case is the principle of priority of appropriation. On this principle the constitutional and statutory provisions in all three states, Colorado, Wyoming and Nebraska, are in exact agreement. Nebraska insists upon this principle and demands its application to the administration of the North Platte and Platte rivers and tributaries regardless of the state lines.

With specific reference to the question relating to the diversions and storage of water made out of priority by the United States Bureau of Reclamation, we believe that there can be no question of Wyoming's responsibility for them. As held by this Court in the opinion and ruling upon Wyoming's motion to dismiss the bill herein, the Bureau of Reclamation is a Wyoming appropriator, for which the State of Wyoming is responsible. All rights, both as to storage and direct flow diversions of water in reservoirs and canals operated by the Bureau of Reclamation on the North Platte River, whether in Nebraska or Wyoming, are adjudicated and allowed by the Wyoming Board of Control, and the practical control of their operation is unquestionably in the hands of the Wyoming state authorities. Both the Interstate and Fort Laramie Canals serve a substantial acreage of Wyoming lands with waters, both natural flow and storage; and a substantial portion of the storage made in each season in the

Pathfinder and Guernsey Reservoirs is released for and used upon Wyoming's lands. To that extent the acts complained of are for the direct benefit of Wyoming, and the fact that incidentally, and in the process of benefiting Wyoming lands, water is made available for some Nebraska lands cannot excuse Wyoming's acts.

This is especially so in view of the fact that such water as is thus taken out of priority and made available for Nebraska lands is taken contrary to the Constitution and Statutes of the State of Nebraska, which Nebraska officials are sworn to defend and support. It is an interference with Nebraska's sovereignty when her officials are prevented, by the act of Wyoming and the Bureau of Reclamation, from enforcing Nebraska law in Nebraska.

Thus Nebraska is seriously damaged, even when the out-of-priority water is applied to Nebraska lands. While the monetary damage to Nebraska as a whole is not the same as it is where out-of-priority water is retained in Wyoming, yet the resulting situation is to that extent a breakdown of Nebraska law enforcement. Any efficient administration and policing of the waters of the state must depend upon the fairness and equality with which the laws are administered, and, where a junior appropriator, whether in Wyoming or Nebraska, is allowed to take water without regard to the rights or needs of a senior appropriator, the result is a disrespect both for the law and for the officers enforcing that law, and thereby the task of those officers becomes increasingly more difficult through the absence of willing obedience to the law.

Nebraska insists that the rule of priority shall be respected both in Wyoming and Nebraska. In the case of the Mitchell canal, Nebraska was able to take care of the problem by her own courts and administrative officials, after extensive and expensive litigation. Where resort to this court is the only method, Nebraska asks through the medium of this suit, that this court make possible the orderly administration of waters of the river by an interstate administration on the principle of priority of appropriation. The enforcement of this principle is for the protection of all Nebraska appropriators, in their priority rights, and the Reclamation projects, while junior to some, are senior to others. We ask the court to protect

these projects against encroachments by others which are junior to them. We further ask the court to protect them, in accordance with the principle of priority of appropriation, against diversions by senior canals of an amount of water which is in excess of the amount of the appropriations of those senior canals.

With reference to the matters raised by Judge Rose as to the effect of the decision of the Nebraska Supreme Court in the Mitchell case, we believe in the first place, that he has misquoted that decision. There is no holding therein that Nebraska can go into Wyoming for the purpose of controlling the headgates of a canal diverting in Wyoming. It is held that Nebraska can, if practicable, control the water in the canal after it gets into Nebraska.

That principle can have no application to the situation of the Interstate and Fort Laramie canals, since their distance from the river at the points where they respectively cross the state line, is such that it will be impossible as a practical matter for the water to be put back in the river, especially for it to be put back at a point where it could be used by the western-most senior Nebraska appropriators. Nebraska seeks to protect its senior canals in all Nebraska, and not merely in counties east of Morrill County as stated by Judge Rose.

A reference to Exhibit 97 shows that, while the Mitchell canal is less than a mile distant from the river where it crosses the state line, the Interstate canal is more than six miles and the Fort Laramie canal twelve miles from the river at the points where they respectively enter the state. The practical impossibility of applying the Mitchell rule to the situation of these two canals is apparent.

Another distinction between the Mitchell case and the situation of the Nebraska appropriators under the Reclamation canals is that the Mitchell District is a Nebraska corporation subject to Nebraska law, while the storage in the Pathfinder and Guernsey reservoirs and the diversions in the Interstate and Fort Laramie canals have been and are now entirely under the control of the United States Bureau of Reclamation, a Federal agency operating for storage and diversion of waters under Wyoming law. Nebraska citizens and corpora-

tions, have no control over such storage and diversions and, therefore, no responsibility therefor.

With reference to the Mitchell canal, the State of Nebraska does not charge Wyoming with anything damaging Nebraska since the Nebraska court decision of September, 1935, giving Nebraska control of that canal. However, the necessity for those legal proceedings grew out of the refusal of Wyoming to cooperate with Nebraska, in spite of the repeated requests of Nebraska officers. We complain of Wyoming's acts as to the Mitchell canal to and including the year 1935.

Concluding this statement, Nebraska states that Wyoming does not need to defend the priority rights of any canal or ditch in Nebraska since Nebraska does not attack any such priorities. Wyoming is, however, called upon to defend its past conduct and its threatened future actions in permitting appropriators operating in Wyoming to store or divert water from the North Platte River out of the order of priority.

Nebraska will also ask that in its decree this court should protect Nebraska appropriators under all canals diverting in Wyoming, in the rights to which their priorities entitle them, against future violations of the principle of priority by the State of Wyoming, and by Wyoming appropriators whether from the stream or under such canals.

MR. HOWELL: This statement will appear in the record?

MR. GOOD: Yes, I have given a copy of it to the reporters so they can set it out exactly as I have read it.

Nothing further that you care to state?

JUDGE ROSE: No.

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